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No. 217.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

SUPERIOR FILMS, INC.,

Appellant,

vs.

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT,

Appellee.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

OPINION BELOW.

The majority and the dissenting opinions in the Supreme Court of Ohio are reported in 159 O. S. 315, 112 N. E. 2d 311, and appear at R. 56 to 70.

JURISDICTION.

Jurisdiction of this court is invoked under Section 1257 (2), Title 28 of the United States Code. The judgment of the Supreme Court of Ohio was entered April 29, 1953. Application for appeal to this court was made June 26, 1953, and probable jurisdiction was noted by this court October 12, 1953.

STATEMENT OF THE CASE.

Appellant is a corporation engaged in the business of producing motion pictures. Under the direction of its president, Seymour Nebenzal, it produced and is the owner of a motion picture entitled "M". On September 11, 1952, pursuant to the provisions of Sections 154-47—154-47i, inclusive, of the General Code of Ohio,[1] appellant submitted a print of the motion picture "M" to the appellee for censorship and approval. It paid the required fee of $30.00 at the time of the submission of the print. On September 16, 1952, the advisory board of appellee issued a certificate rejecting the film for distribution and exhibition in the state of Ohio, the grounds of rejection being stated on the certificate as "on account of being harmful." (R., 19 through 23.)

On September 25, 1952, appellant commenced this action by filing in the Supreme Court of Ohio its petition pursuant to Section 154-47h, Ohio General Code, and thereafter filed its amended petition (R., 6) upon which issues were joined by the filing by appellee of its answer. (R. 8.) Facts necessary for the determination of the issues were stipulated. (R., 9.)

[1] By enactment of the Ohio legislature effective October 1, 1953, O.G.C. Sections 154-47—154-47i, inclusive, became Sections 3305.01 et seq. of the Revised Code of Ohio.

A print of "M" was incorporated in the stipulation as an exhibit before the Supreme Court of Ohio and is a part of the record on appeal, available for viewing by this court.

Briefly, the motion picture "M" portrays a story laid in a metropolitan city in which there is at large a psychopathic character, previously but prematurely dismissed from a mental hospital, who is driven by a mental fixation. In order to protect them from what he considers to be the evil world of men, he is driven to kill small girls. The principal character becomes the object of an intensive police search which is directed toward all known underworld elements in the community. These elements are part of an organized syndicate. Its leader concludes that, in order to avoid police raids and pressure, his organization should capture the psychopathic killer for whom, contemporaneously, the police are searching. The methods employed by the police as well as the means employed by the racketeers are developed in the story, and, although the police effect the final arrest, it is the widely organized racketeer element that manages to first discover the trail and capture the demented killer. No actual murders of children are shown and it is made clear at the outset that there is no "sex angle" involved. The picture is devoted to characterization as well as development of plot. It clearly emphasizes our inadequate hospital facilities which permit premature dismissal of mental patients and the risks incurred by neglectful parents who permit children to roam unattended on the public streets. It points out that, through the use of money and force, a criminal syndicate can develop in a metropolitan city a more efficiently organized group than the enforcers of law and order. But it shows that the **sine qua non** of such a syndicate is public apathy and tolerance towards the petty criminal who is the essential base of such a syndicate. The limitations in

personnel and money upon any police force and the patient, dedicated job that the police perform when faced with a new or unconventional criminal is dramatized in detail. The action culminates in the confession of the principal character describing the conditions and forces that twisted his mind (R., 44)—the broken home, a vindictive parent, the oversensitive spirit, poverty, the groping for a solution, and the conclusion he reached as to what appeared to him to be the only possible conduct. The picture seeks to gain popular understanding that mental illness has concrete environmental causes and solutions and that efforts to remedy the problem therein depicted are deserving of support. To a viewer the picture presents a compelling dramatization of the story told through the artful use of camera, characterization and music.

THE STATUTES INVOLVED.

Ohio General Code Sections 154-47—154-47i, inclusive, are set forth in full in Appendix "A" to this brief, but so much of these statutes with which we are principally concerned may be epitomized as follows:

> "It shall be the duty of the department of education to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in Ohio. * * * Such films shall be submitted to the department and passed and approved by it before they shall be delivered * * * for exhibition. The department shall charge a fee of three dollars for each reel of film * * * (of) one thousand linear feet * * *. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund, except * * * Fifty per cent [2] of all * * * license fees * * * in excess of * * * operating expenses * * * shall be * * * used * * * (for the preparation) of a suitable collection

[2] This amount was changed to 100% by R.C. Sec. 3305.03 effective October 14, 1953.

of visual aids for loans to the educational institutions of Ohio (and) the total sum so set aside * * * (is) hereby and hereafter appropriated (for said purpose). Only such films as are in the judgment and discretion of the department of education of a moral, educational or amusing and harmless character shall be passed and approved * * * (and) such approval may be revoked whenever in the judgment of the department of education the public welfare requires it. * * *"

SPECIFICATION OF ERRORS.

The errors committed by the Supreme Court of Ohio are fully set forth in the assignment of errors (R., 2) which in substance assert that the court erred:

(1) In holding that Ohio G. C. Sections 154-47—154-47i, inclusive, do not constitute, on their face and as applied to the plaintiff, a prior restraint upon and censorship of the freedom of speech and of the press repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

(2) In holding that Ohio G. C. Sections 154-47—154-47i, inclusive, which authorize a prior restraint upon and censorship of the freedom of speech and of the press for which the criteria are the terms "moral, educational or amusing and harmless", are not, on their face and as applied to plaintiff, indefinite and vague standards incompatible with and repugnant to the requirements of the First and Fourteenth Amendments of the Constitution of the United States.

(3) In holding that Ohio G. C. Sections 154-47—154-47i, inclusive, and the order of rejection of September 16, 1952, issued by the defendant pursuant thereto, on their face and as applied to ban plaintiff's motion picture "M", are not

repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

(4) In holding that Ohio G. C. Sections 154-47—154-47i, inclusive, to the extent that they provide for the payment of a fee prior to the distribution and exhibition of motion pictures, do not impose an undue burden upon the distribution and exhibition of motion pictures and, on their face and as applied to plaintiff, are not repugnant to the First and Fourteenth Amendments of the Constitution of the United States by reason thereof.

SUMMARY OF ARGUMENT.

The validity of the Ohio statutes comprising its motion picture censorship laws is challenged and in support of this contention, we shall rely upon the following points:

(1) Ohio G. C. Sections 154-47—154-47i, inclusive, on their face and as applied to appellant are, a prior restraint and censorship of speech and of the press in violation of and repugnant to the First and Fourteenth Amendments of the Constitution of the United States;

(2) Said statutes which authorize and require prior restraint and censorship of speech and of the press, for which the criteria are the terms "moral, educational or amusing and harmless", and which authorize and require the revocation of any certificate of approval thereof if "the public welfare requires it" are, on their face and as applied to appellant, indefinite and vague standards incompatible with and repugnant to the requirements of the First and Fourteenth Amendments of the Constitution of the United States;

(3) Said statutes which authorize and require prior restraint and censorship of motion pictures and the order of

appellee pursuant thereto are, on their face and as applied to appellant, a discriminatory denial of equal protection of the law incompatible with and repugnant to the Fourteenth Amendment of the Constitution of the United States;

(4) Said statutes which authorize and require prior restraint and censorship of motion pictures and the order of appellee pursuant thereto, are, on their face and as applied to ban appellant's motion picture "M", incompatible with and repugnant to the First and Fourteenth Amendments of the Constitution of the United States;

(5) Said statutes, in requiring the payment of a fee as a condition to censorship, distribution and exhibition of motion pictures, impose an undue burden on such distribution and exhibition, and thus, upon their face and as applied to appellant, are incompatible with and repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT.

POINT I.

THE OHIO CENSORSHIP LAW IS VOID ON ITS FACE AS A PRIOR RESTRAINT OF THE FREEDOM OF SPEECH AND OF THE PRESS.

The Ohio statute requires that, before any person, firm or corporation may express opinions, report events, or comment upon any subject, regardless of whether it is a cartoon, a documentary of war or of a social, economic or political problem, a love story, a grand opera, a dramatized classic, a biography, or whatever, so long as the medium of dissemination is a motion picture film to be exhibited to the public of the state of Ohio, consent to exhibit the picture first must be obtained from the state.[2] Without such consent, the exhibition of a film, no matter what its content may be, is a criminal act.

The pernicious and stultifying evil of a prior license as a requisite to human expression has been recognized by our philosophers, our statesmen and our courts from the inception of our government. The freedom of speech and of the press, protected from abridgment by the First Amendment to the federal constitution, has been the object of special concern and protection by this court. It was therefore natural that this court should recognize the principle that, in addition to being protected from infringement by the federal government, the liberty of speech and of

[2] "Films commonly known as newsreels" were exempted from the requirement of censorship by action of the Ohio legislature effective October 13, 1953. (Ohio R.C. Sec. 3305.01) This action was taken subsequent to the decision in State v. Smith, 48 O.O. 310, 63 O.L.A. 452, declaring censorship of newsreels to be unconstitutional. It should be noted that no definition of "newsreels" is contained in the statute.

the press which the First Amendment guarantees is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. **Gitlow v. New York**, 268 U.S. 652, 69 L. Ed., 1138, et seq.

A. Censorship of the Ideas Being Communicated by Speech or the Press Has Never Been Permitted.

During the past 40 years the motion picture, by reason of its technological improvements and the development of thought content through artistic presentation, has established itself as an "organ of public opinion." As such it has sought, has received, and now enjoys the same protection from unconstitutional suppression as do other modes of communication.[4] Full expression of this concept is to be found in **Burstyn v. Wilson**, 343 U.S. 495, 96 L. Ed. 1098; and **Gelling v. Texas**, 343 U.S. 960, 96 L. Ed. 1359.

Throughout this same period many attempts have been made through legislative and executive action (and, in a few instances, judicial action) to invade the sanctuary granted the press and speech. In most instances these attempts have taken the form of state statutes and city

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[4] Newspapers—Near v. Minnesota, 283 U. S. 697, 75 L. Ed. 1357; Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660; Pennekamp v. Florida, 328 U. S. 331, 90 L. Ed. 1295; Craig v. Harney, 331 U.S. 367, 91 L. Ed. 1546.

Books and magazines—Winters v. New York, 333 U.S. 507, 92 L. Ed. 840; Hannegan v. Esquire, 327 U.S. 146, 90 L. Ed. 586.

Pamphlets and handbills—Schneider v. State, 308 U.S. 147, 84 L. Ed. 155; Lovell v. Griffin, 303 U.S. 444, 82 L. Ed. 949; Martin v. Struthers, 319 U.S. 141, 87 L. Ed. 1313; Murdock v. Pennsylvania, 319 U.S. 105, 87 L. Ed. 1292.

Television—Dumont Laboratories v. Carroll, 184 F. 2d 153 (C. A. 3d).

Speech or assembly on or about public streets, parks or halls—Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed. 1213; Kunz v. New York, 340 U.S. 290, 95 L. Ed. 280; Niemotko v. Maryland, 340 U.S. 268, 95 L. Ed. 267; Hague v. C.I.O., 307 U.S. 496, 83 L. Ed. 1423; Thomas v. Collins, 323 U.S. 516, 89 L. Ed. 430.

Speech in and on private property—Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 1131; DeJonge v. Oregon, 299 U.S. 353, 81 L. Ed. 278; Taylor v. Mississippi, 319 U.S. 583, 87 L. Ed. 1600.

ordinances imposing sanctions for the violation of provisions enacted under the exercise of the police power. In every instance in which the question has been brought before this court and tested under the First and Fourteenth Amendments, restraints, which have, in terms or in effect, permitted censorship of the ideas contained in or the content of speech or the press, have been declared void. A clear line has been drawn between, on the one hand, subsequent punishment for the abuse of the liberty of speech or of the press, based upon the need to prevent physical interference with public convenience and order and, on the other hand, evaluation by agents of the state of the validity, desirability or propriety of the ideas expressed by the author.

A comparison of similar cases involving permits or licenses may serve to make this line readily apparent. This court has stated that the public interest in the orderly use of public streets and abutting areas justifies regulation through permit requirements upon whomsoever shall seek to hold parades or public meetings or other activities which would tend to impede traffic, emergency services and other lawful uses of the public ways. The fact that publication of ideas through speech or placards or the like is incidentally confined to such hours and places as the public convenience requires is not unconstitutional. **Cox v. New Hampshire**, 312 U.S. 569, 85 L. Ed. 1049. In so saying, however, the court expressly stated that the statute involved did not in any way permit, as a factor in the grant or denial of a permit, the scrutiny of the purpose of the parade or the views to be expressed at the meeting. "Their right to do (anything) apart from engaging in a 'parade or procession' upon a public street is not here involved" (312 U.S. 569, 573, 85 L. Ed. 1049, 1052). Nor was there

any question of discriminatory enforcement or of a fee exceeding the cost of administration.

Contrast **Cantwell v. Connecticut**, 310 U.S. 296, 84 L. Ed. 1213, wherein the issuance or denial of a permit was within the discretion of the agent of the state based upon his determination of what was a "religious cause." This court unanimously said:

> "* * * such a censorship * * * is a denial of liberty * * * to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. 296, 305, 307, 84 L. Ed. 1213, 1219.

And similarly in **Niemotko v. Maryland**, 340 U.S. 268, 95 L. Ed. 267, and **Kunz v. New York**, 340 U.S. 290, 95 L. Ed. 280, permits for public meetings in connection with the applicants' religious practices were withheld or revoked and not renewed. The applicants were convicted under criminal statutes for having proceeded with such meetings without the requisite permission. This court reversed and held that because the ordinances granted "* * * an administrative official discretionary power to control in advance the right of citizens to speak on religious matters * * *" (340 U.S. 290, 293, 95 L. Ed. 280, 284), they were unconstitutional on their face. See also **Lovell v. Griffin**, 303 U.S. 444, 82 L. Ed. 949, where the distribution of "literature" of any kind was prohibited without a permit from the city manager, and **Largent v. Texas**, 318 U.S. 418, 87 L. Ed. 873, wherein the permit to distribute books was to issue only if the mayor deemed it "proper and advisable." In both cases this court held the ordinances in question "void on their face." It should be noted that the advocacy

of religious views has not been the only cause protected from state censorship. See **Thomas v. Collins**, 323 U.S. 516, 529-530, 89 L. Ed. 430, 440; **Thornhill v. Alabama**, 310 U.S. 88, 84 L. Ed. 1093 and **Hague v. C.I.O.**, 307 U.S. 496, 83 L. Ed. 1423. Thus it is clear that in every instance (and the foregoing list does not exhaust the possible examples) where statutes or ordinances have permitted, as a condition to expression, evaluation of the views to be expressed or approval of the purpose of the cause espoused, as distinguished from the situation presented in the **Cox** case, they have been declared invalid.

An illuminating comparison may be drawn between **Saia v. New York**, 334 U.S. 558, 92 L. Ed. 1574 and **Kovacs v. Cooper**, 336 U.S. 77, 93 L. Ed. 513. Both involved sound trucks. In the **Saia** case sound trucks were banned, but there was a provision that exempted the use of sound trucks if the purpose was to use them to broadcast "news, matters of public concern and athletic activities" and if police permission first was secured. On the other hand the **Kovacs** case involved merely the subsequent punishment of whoever used sound trucks in such a way as to make "loud and raucous" noises on the public streets. It is clear that in the **Saia** case the ordinance was voided because enforcement could be premised upon evaluation by the police in terms of their opinions of whether the content of the speech being broadcast met the above noted tests for exemption. In contrast in the **Kovacs** case enforcement could be premised only upon the physical impact upon the peaceful and orderly use of the public streets regardless of what was said or who said it. This distinction was emphasized by this court when it said:

> "When ordinances undertake censorship of speech or religious practices before permitting their exercise,

the Constitution forbids their enforcement * * * (but here) there is no restriction upon the communication of ideas or discussion of issues * * *" 336 U.S. 77, 82, 89, 93 L. Ed. 513, 519-520-523.

See also **Chaplinsky v. New Hampshire**, 315 U.S. 568, 86 L. Ed. 1031, discussed infra, pages 20-21. This same distinction was reiterated by the court in **Feiner v. New York**, 340 U.S. 315, 95 L. Ed. 295. See infra, pages 20-22 and the language there quoted.

It is thus plain beyond any question or doubt that a licensing system which reduces the constitutional right of free expression to a privilege, a privilege to be doled out by public authority only if the purpose or content of the expression meets with the licensor's approval, is absolutely void. The historic reasons have been eloquently preserved in the words of the late Chief Justice Hughes in his opinions for this court in **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357 and **Lovell v. Griffin**, supra.

From the great body of law dealing with protection from prior restraint, there has emerged one clear concept and it has particular application to this case. It may be stated as follows: Any law which by its terms requires, before any expression of thought may be publicly uttered or published, that the one who seeks to utter or publish the same must first obtain the permission of a public official charged with the duty of appraising and evaluating such thought is unconstitutional on its face because it establishes a previous restraint on freedom of speech and of the press in violation of the protection accorded by the First and Fourteenth Amendments from both federal and state action. The statutes here under consideration fall wholly within the prohibition of this principle. We, therefore, have no occasion to inquire as to the permissible scope of subsequent

punishment but are concerned especially with the Ohio censorship law as an unconstitutional prior restraint upon the right to express thoughts through the medium of the motion picture. The requirement that all thought, prior to expression through the medium of the motion picture, must be channeled through the minds of employees of the state who become the arbiters thereof is especially obnoxious. Here the author and the producer are limited to the expression of only such thoughts as, in the judgment and the discretion of a censor, measure up to the censor's concept of that which affirmatively is "moral, educational or amusing and harmless."

The language of Justice Douglas expressed in his concurring opinion in **Gelling v. Texas**, supra, is particularly applicable to the Ohio statutes.

> "The evil of prior restraint, condemned by Near v. Minnesota, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931), in the case of newspapers and by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, (1952) in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 96 L. Ed. 1068, 72 S. Ct., 813 (1952), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated." 343 U.S. 960, 961, 96 L. Ed., 1359.

B. Censorship of Movies in Advance of Publication Cannot Be Justified as an Exception Because of the Nature of Motion Pictures.

In the court below the attorney general argued that certain compelling interests of the state of Ohio permit this licensing system. Although conceding that motion pictures are within the protection of the First and Fourteenth Amendments, it was argued that there is a potential for such substantive evil that an exception should be made. In its opinion the Supreme Court of Ohio sustained this argument. It approved the Ohio act as an exception to the general rule prohibiting prior restraint of publication because of its view that the movies present special problems. The problems which the court points out are as follows: (1) motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression; (2) without the power of censorship the state is left without an effective weapon to control the exhibition of objectionable pictures; and (3) since over the period of ten years only 59 motion pictures were rejected and 44 finally unlicensed, censorship poses no substantial burden upon expression of thought. At best these are nothing but rationalizations.

(1) The contention that motion pictures per se are both more effective in influencing human behavior and possess a greater potential for evil than the press, radio or television cannot be sustained, and, unless it can be, previous censorship as applied to motion pictures is as offensive to the Constitution as a prior restraint on other media of information. As pointed out above, exceptions to the rule against restraints on publication, even in the form of subsequent punishment, have been allowed only in those instances where utterances or expressions are the obvious

and demonstrable cause of some imminent substantive evil. To contend that a whole mode of communication such as the motion picture creates an imminent substantive evil so overwhelming as to justify a license system in advance of publication is patently absurd. Obviously the motion picture possesses as great a capacity for good as for evil. If the motion picture is an effective mode of communication, which it is conceded to be, we know of no constitutional principle which denies protection to a media of communication because of its effectiveness. Effectiveness of the media should command protection rather than censorship.

The Ohio court suggests that motion pictures, at least in part, are responsible for the alarming rise in juvenile delinquency in this country. It is significant that the court did not support its statement with statistical proof that the incidence of juvenile delinquency in Ohio under censoring law are less than in any one of the 42 states which have no censorship. The reason that the court did not cite proof in support of its statement is that there is no proof. Judge Struble, in **State v. Lerner**, 51 O.L.A. 321, 337-338, in discussing a report of the American Youth Commission showing that most children receive their information or misinformation about sex from their contemporaries points out that less than 1% of all youth are misled by the movies and that an equal number are misled by the church. The fatuity of the view accepted by the court below may be illustrated, in addition, by a reference to certain statistics prepared by the Children's Bureau of the U. S. Department of Health, Welfare and Education.[5] Those states in

[5] Reports from juvenile courts to the Children's Bureau of the U. S. Department of Health, Education and Welfare disclose that nationally the number of delinquency cases reported in 1952 exceeded by approximately 14% the number reported in 1946—but that in the 4 year period from 1948-1952 the increase in delinquency cases was 29%. The later period is coextensive with the period of the cold war and the Korean War. In Ohio during the period of 1948-1952 incidence of juvenile

which censorship is operating have no less of a problem than the states in which there is freedom to show motion pictures without a prior license. From 1946 through 1952 while juvenile delinquency nationally increased 14%, the average weekly attendance at motion picture houses decreased 49% in the United States.[5] If the issue is to be determined by resort to assumptions, we submit, in view of these statistics, that it is just as logical to urge that juvenile delinquency has increased during the past six years because of the failure of the public to attend the movies.

The point of this is that the argument of the attorney general, and the view taken by the Ohio court is based upon an absolutely unsubstantiated assumption. There is no showing that motion pictures cause or even tend to contribute to juvenile delinquency nor that logically such a result could follow. Not a shred of evidence has been introduced on the point.

If the state of Ohio is concerned over the morals of its youth, as well it might be in view of the alarming increase in juvenile delinquency, in spite of censorship, the remedy should be directed at the object of its concern, the youth, and not the "all or nothing," approach through complete censorship. **Kunz v. New York**, 340 U.S. 290, 294-295, 95 L. Ed. 280, 284.

(2) The Ohio Court endorses another assumption—that uncensored motion pictures present a general danger to the public welfare and morality. This assumption too is demonstrably false. Only six states and approximately fifty cities in the United States have motion picture cen-

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delinquency increased 43% while in Indiana, an adjoining state having no censorship of movies, juvenile delinquency increased on the average only 31% during the same period. News Notes on Juvenile Delinquency, U. S. Department of Health, Education and Welfare, October 13, 1953, and Public Welfare Statistics, Ohio. January 1953—Vol. 8 No. 1.

[5] Motion Picture Almanac 1947-1948—1953-1954—Quigley Publishing Co., N. Y.

sorship laws. There is no proof that the citizens of the 42 states and thousands of cities having no censorship have become morally corrupt by the exhibition of unlicensed films.

In addition, it is scarcely likely that the invalidation of the censorship laws will "open the floodgates" to indecency, as the court below feared. The state laws punishing indecency and obscenity after publication are sufficient deterrents to those who would be "purveyors of immorality."[7] The Production Code Administration of the Motion Picture Association of America and unofficial pressure groups such as the Legion of Decency, General Federation of Women's Clubs, Protestant Motion Picture Council, etc., may also be relied upon to keep motion pictures "pure."[8] The real danger is that those who seek to purify the movies will leave them sterile.[9]

Certainly, periodicals if mis-used have as great, if not a greater, potential for harm as improper motion pictures.[10] Motion pictures can reach only a limited number of people simultaneously. It may be assumed that the penal laws

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[7] See, for example, Ohio G. C. Sections 13035 and 13040, now Ohio R. C. Sections 2905.34 and 2905.40 (Appendix B), and the federal law prohibiting the importation and interstate transportation of "any obscene, lewd, lascivious, filthy * * * motion picture film", 18 U.S.C. 1462 (a).

[8] Ernst & Lindey, The Censor Marches On, page 86, et seq.; Motion Pictures and The First Amendment, 60 Yale L. J. 696, 713-714; Kuperman & O'Brien, Motion Picture Censorship, 36 Cornell L.Q. 273, 299-300; Censorship of Motion Pictures, 49 Yale L. J. 97, 105 et seq.; Ruth A. Inglis, Freedom of the Movies, pages 151-171; Frederic M. Thrasher, Education versus Censorship, The Journal of Educational Sociology, Jan., 1940, pages 285, 287, 289; Theodore Kadin, Administrative Censorship, 19 Boston U.L.R. 533, 559-560.

[9] Ernst & Lindey, The Censor Marches On, pages 75-114; Zechariah Chafee, Free Speech in the U. S. (1941), pages 540-548.

[10] "* * * they can debase and vulgarize mankind. They can endanger the peace of the world; they can do so accidentally, in a fit of absence of mind. They can play up, or down, the news and its significance, foster and feed emotions, create complacent fictions and blind spots. * * *" Commission on Freedom of the Press, "A Free and Responsible Press," page 3.

will be enforced with reasonable speed after exhibition, to prevent injury to any large number of people from indecent or immoral movies. Many tabloids and picture magazines, on the other hand, are distributed simultaneously to several million readers. (And consider the tremendous potential in the simultaneous nation-wide radio and television audience.) The harm that may be caused by the publication of immoral, indecent or sacrilegious matter in periodicals could not be seriously urged today as justification for licensing them. As Mr. Chief Justice Hughes wrote in **Near v. Minnesota**, 283 U.S. 697, 720, 75 L. Ed. 1357, 1369:

> "The fact that the liberty of the press may be abused * * * does not make any the less necessary the immunity of the press from previous restraint. * * * Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

(3) The Ohio court finds support in the fact that during the past ten years only 59 motion pictures have been rejected by the censors. What the court did not say was that throughout the same number of years hundreds of deletions have been made at the insistence of the Ohio censors. (Reports of Division of Film Censorship.) There are few who have not observed how deletions by censors can render an otherwise stirring movie meaningless. No one can say that censorship in Ohio is not real and that it does not constitute a substantial restriction on expression of serious thought. The fallacy of justifying the validity of the statutes under consideration by reciting the number of pictures banned or deleted, however, lies in the fact that the evil of censorship stems from what the censor **may** do, not what he has done. What has been done is not only not decisive, it is not even relevant, except as it con-

cerns the movie "M", as discussed in Point IV, infra. Our challenge of the Ohio statutes relates, in addition, to what could be done. **Thornhill v. Alabama**, supra:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. (Citations omitted.) * * * It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. (Citations omitted.) * * * Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. (Citations omitted.) * * *" 310 U.S. 88, 97-98, 84 L. Ed. 1093, 1099-1100.

C. The Ohio Censorship Law Requires No Proof of the Imminence of a Substantive Evil to Justify Restraint.

To illustrate further the lack of justification, under constitutional considerations of the prior censorship of motion pictures, a review of the cases which have considered the limits of community control of speech and the press should be set forth. At the outset it should be emphasized that **these** cases involve only subsequent punishment for abuse of the liberty of speech. Without in any way conceding that censorship in advance can be valid, we present them for the purpose of comparing the scope of the burden which this court has required the state to bear to justify **even subsequent** punishment with the unsubstantiated assumptions urged as justification for a **prior** license in Ohio.

One group of cases is represented by **Feiner v. New York**, 340 U.S. 315, 95 L. Ed. 295, and **Chaplinsky v. New Hampshire**, 315 U.S. 568, 86 L. Ed. 1031. In each of these, this

court required and independently found that in fact there had been an actual breach of the peace or riot or that such disorder was imminent. In the **Chaplinsky** case the defendant's speech created a riotous situation, while in the **Feiner** case the crowd that had assembled to hear defendant's speech had blocked traffic and his words elicited an ugly and imminently explosive mood. In both cases, the arrest or restraint upon speech, due to the imminence of disorder, was only after the defendants' views had been expressed and, indeed, after requests to discontinue the speech had been made and disregarded. In both cases the court adopted the unanimously approved analysis of this problem set forth in **Cantwell v. Connecticut**, supra, wherein this court said:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, **appears** the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." 310 U.S. 296, 308, 84 L. Ed. 1213, 1220. (Emphasis ours.)

This court found that "the facts disclosed by the record * * * demonstrate that (defendant's words) are epithets likely to provoke * * * a breach of the peace * * *" (315 U.S. 574, 86 L. Ed. 1036), and that such breach of the peace was imminent. Accordingly it was held that the conviction of Chaplinsky was justified. And in the **Feiner** case the court said that the defendant was "neither arrested nor convicted for the making or the content of his

speech. Rather it was for the reaction which it **actually engendered.**" (340 U.S. 319-320, 95 L. Ed. 299-300.) (Emphasis ours.)

Compare the Ohio censors' language that, "There is a conviction that the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime." This illustrates the danger which attends censorship in advance of publication. What the censor is saying is that he or she fears or is apprehensive that the exhibition of the picture **could** lead to immorality and crime. Mere apprehension or fear of danger does not justify suppression of expression but the substantive evil must exist and be real, its imminence must be apparent and its gravity must be serious.

Another situation is illustrated by **Schenck v. U. S.**, 249 U.S. 47, 63 L. Ed., 470 and **Dennis v. U. S.**, 341 U.S. 494, 95 L. Ed. 1137. In the **Schenck** case the defendant was publishing pamphlets and speeches urging resistance to the draft in World War I. This court held that, in time of war, an incitement to obstruction of the national war effort was sufficiently grave to permit the arrest and prosecution of the author. The court concluded:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. 47, 52, 63 L. Ed. 470, 473-474.

Again we see that mere apprehension of harm is not sufficient to justify restraint. The danger must not only be imminent but must be sufficiently grave to override society's interest in and the need of free expression. This concept is amply illustrated in the **Dennis** case. This

court painstakingly analyzed the application of the test of a "clear and present danger" of a substantive evil in light of the cases in which the problem has been involved since the **Schenck** case. The court was principally concerned with the degree and burden of proof and the showing of proximity of result which the government was required to sustain in order to meet the constitutional requisite for convictions wherein the liberty of speech and of the press were drawn in question. It included the need to satisfy the trial court and the jury, the Court of Appeals and this court that the defendants "intended to overthrow the Government as speedily as circumstances would permit"; that "the requisite danger existed"; and that "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (341 U.S. 509-511, 95 L. Ed. 1152-1153.)

It is not our purpose to attempt to precisely epitomize the views expressed by this court upon the problem raised by these last noted cases and the cases discussed therein. However, the lessons derived therefrom which are pertinent here can be summarized. First, in **all** the cases reviewed in the **Dennis** case there appears unanimity that subsequent punishment is justified only if it is plain that it is the "reaction engendered"—the imminence of some breach of public order—that gives rise to the penalty and not the views being expressed or the content of the message being distributed. Second, in addition there must be substantial affirmative proof of the presence or imminence of a substantive evil directly resulting from the words being published. The very difficult problem of what comprises imminence, which appears to be inseparably entangled with the scope of the substantive evil shown, need not be discussed. It is sufficient here to point out the comparison

referred to above, i.e., the Ohio statute in question here has as its deliberate purpose the violation of the first requirement and the statute and the Supreme Court of Ohio permit unsubstantiated assumptions to satisfy the second requirement. If the failure to satisfy these two requirements would bar subsequent punishment, then a fortiori their disregard must invalidate censorship in advance. To put it another way, the "clear and present danger" test has been evolved as a measure of the burden that the state must bear to justify any exception to the rule that restraints upon speech and the press are invalid. When restraint is applied in advance, there can be no publication and hence no occasion to bring to bear the "clear and present danger" test. This court has declared that clear and present danger is the minimum required to satisfy the exception. If that is so, then censorship in advance, which the attorney general attempts to justify as an exception and which per se precludes applicability of said test, cannot be valid because it entirely disregards the minimum burden imposed by the decisions of this court.

With the foregoing in mind it is readily understood why censorship in advance has been uncommon on the American scene. Where it has been discovered this court has without hesitation declared that governmental authority may not assume custody of the right to free speech and press and then license it as a privilege subject to advance approval of the views to be expressed. Wherever deliberate attempts to do so have been found, they have been voided. **Near v. Minnesota**, supra; **Hannegan v. Esquire**, 327 U.S. 146, 90 L. Ed. 586; **Burstyn v. Wilson**, supra; **Gelling v. Texas**, supra. Where the terms of the laws involved permitted it, the laws have been voided. (See the review of the "permit" cases discussed under "A" above.) Where the

necessary effect of the law or the exercise of lawful power has been to comprise a censorship, it has been voided. **Grosjean v. American Press Co.**, 297 U.S. 233, 80 L. Ed. 660; **Murdock v. Pennsylvania**, 319 U.S. 105, 87 L. Ed. 1292; **Pennekamp v. Florida**, 328 U.S. 331, 90 L. Ed. 1295; **Craig v. Harney**, 331 U.S. 367, 91 L. Ed. 1546. See also the cases cited under Point IV, infra.

Can it be doubted then that a statute which has for its sole purpose the censorship of expression is void on its face? To find otherwise this court must disregard the entire history of constitutional safeguards which has been written by it. Accordingly, the judgment of the court below should be reversed, in conformity to the views expressed by Judge Taft who in his dissenting opinion (159 O.S. 336), in which Judge Stewart joined, tersely and clearly said:

> "I must dissent because bound by the construction put upon the Constitution of the United States by the Supreme Court of the United States. The pronouncements of the law by that court in Joseph Burstyn, Inc. v. Wilson Com'r., 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, and the later decision of that court in Gelling v. Texas, 343 U.S. 960, 96 L. Ed. 1359, 72 S. Ct. 1002, clearly require the conclusion that the Ohio moving picture censorship statutes are void because of the provisions of the Constitution of the United States."

POINT II.

THE CRITERIA FOR CENSORSHIP UNDER THE OHIO CENSORSHIP LAW ARE UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The tests or standards which the legislature established as the basis for granting or withholding the State's approval of a motion picture are contained in Section 154-47b, to wit: "Only such films as are in the judgment and discretion of the Department of Education of a moral, educational or amusing and harmless character shall be passed and approved."

The court should note at the outset that the basic criteria are such as to require every film to positively measure up to the "judgment and discretion" of administrative officials as to what is affirmatively "moral" and "harmless" or "educational" and "harmless" or "amusing" and "harmless." The statute does not merely require that all films be approved unless they are lewd and obscene or likely to provoke immediate riot, the tests noted as the minimum which would permit even subsequent punishment, in **Chaplinsky v. New Hampshire**, 315 U.S. 568, 86 L. Ed. 1031. (Compare also the tests set forth in Ohio G. C. Sections 13035 and 13040 [11]—Appendix B, herein.) Ohio's system is not one of the open door to all but those who abuse the right and privilege of free expression in some negative manner. Here a motion picture must satisfy in advance the "judgment and discretion" of the State that it affirmatively meets the State's conception of morality, education or amusement, always, of course, being within the State's conception of what is "harmless."

[11] Now designated as R. C. Sections 2905.34 and 2905.40.

The basic criteria set forth in the statute defy the precise application which is a constitutional necessity. When is an opinion affirmatively "moral"? What are the subjects that can be so characterized? Is there any single minimum or quantitative measure of what is moral? Reflection will lead to but one answer—there is not. Perhaps, in an earlier day, the content of what was deemed to be affirmatively moral had a common precision which contemporary culture can no longer recognize as definitive. No one would be so presumptuous as to lay down a list of subjects or purposes representing the final word with respect to what is moral, leaving all other matters subject to human inquiry classified as not moral, hence not fit for presentation by movies.[12]

The outlines of the requirement that movies meet some affirmative test of being "educational" are even more vague. Educational to whom and for what purpose? Can the term "educational" be given any precise meaning except in terms of the opinion of the commentator? The test of "amusing" can only be characterized as a catchall that covers anything which, in the opinion of the censors, seems proper.

The companion test of "harmless", in modifying each of the foregoing, leaves the standards utterly without form, without definition, without predictable meaning of any kind except as interpreted and applied by the "judgment and discretion" of the agents of the State.

If there is any doubt that these standards permit personal definitions and subjective enforcement, it will be dispelled by examining the diverse views expressed by the

[12] Compare Commercial Pictures v. Board of Regents, 305 N. Y. 336, wherein "immoral" and "would tend to corrupt morals", negative standards, had to be equated to mean nothing more than "sexual immorality" in order to muster a majority of the court to sustain the New York censorship statute. Even this dubious restriction does not exist in Ohio.

censors concerning "M" (R., 19-23). There the court will find the censors expressly finding that the characterization and plot is not "serving any valid educational purpose"; is "not educational (because it) creates sympathy rather than a constructive plan for dealing with perversion." We see here nothing but the personal opinions of the censors. In addition, the very concern which was expressly condemned by Justice Hughes in **Near v. Minnesota**, 283 U.S. 697, 75 L. Ed. 1357, forms a principal basis for rejecting "M", to wit, it "undermines confidence in police, law, and government mental institutions"; "it creates distrust in law enforcement agencies"; it "exhibits ineffectiveness of police." The philosophy that "the king can do no wrong" and that the censors are charged with the duty of seeing that this concept remains unimpaired is thus illustrated. Nothing could be more inimical to democratic institutions. As was said by the court in **Matter of Application of Broadway Angels, Inc.**, decided November term, 1953 (New York Supreme Court, Appellate Division):

> "The Board of Regents had no power, under our Constitutional concepts, to suppress the motion picture merely because it believed that it dealt with a social problem in the wrong way. The Board had no right to refuse to license the petitioner's motion picture on the ground that, in its opinion, it represented an unwise or objectionable method of attempting to fight (a social) evil."

Here, indeed, are the censors "* * * adrift upon a boundless sea amid a myriad of conflicting currents * * * with no charts but those provided by the most vocal and powerful * * *" **Burstyn v. Wilson**, 343 U.S. 495, 504, 96 L. Ed. 1098, 1107. Such power vested in state agents, functioning without explicit guides, with the resulting

unpredictable, shifting system of standards cannot be condoned.[13]

A. Those Subject to the Ohio Law Cannot Know What Subject Matter Will Offend the Censors' Views.

An essential part of the right to freely express one's views is the knowledge of the limits of the right. It is a matter of expectancy—the right to be able to measure the risks involved in whatever action one proposes to take. The condemnation contained in the words of the court in **Winters v. New York** cannot be escaped:

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. Stromberg v. California, 283 U.S. 359, 369, 75 L. Ed. 1117, 1123, 51 S. Ct. 532, 73 A. L. R. 1484; Herndon v. Lowry, 301 U.S. 242, 258, 81 L. Ed. 1066, 1075, 57 S. Ct. 732. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press.
>
> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily on civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A.L.R. 1352; Pierce v. United States, 314 U.S. 306, 311, 86 L. Ed. 226, 230, 62 S. Ct. 237. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." 333 U.S. 507, 509, 510, 515, 92 L. Ed. 840, 846, 849-50 (Notes omitted).

[13] Hague v. C.I.O., 307 U.S. 496, 83 L. Ed. 1423; Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed 1213; Saia v New York, 334 U.S. 558, 92 L. Ed. 1574; Kunz v. New York, 340 U.S. 290, 95 L. Ed. 280; Niemotko v. Maryland, 340 U.S. 268, 95 L. Ed. 267.

It has been stipulated (R., 9) that the motion picture "M" produced by Seymour Nebenzal in Germany and approved with English subtitles without elimination by the Ohio censors in 1933 did not differ materially in plot, subject matter or characterization from the motion picture "M" which he produced in the United States and which is now before the court. Having once produced a picture and having received the Ohio censors' stamp of approval that it is a moral, educational, amusing and harmless production, a producer might reasonably expect that if he produced the same picture using American actors and the English language instead of German, it likewise would receive the censors' approval. But not so in this instance because the American version of the picture "M" was banned in the most condemning language by the Ohio censors. To be sure the German production can be legally shown in any theater in Ohio, but not the American version. How could such a result come about? Certainly the meaning of the words, moral, educational, amusing and harmless, if they have any definitive meaning, could not have changed between 1933 and 1953. The same subject matter is presented in both pictures. The factor which has changed is the person of the censor. To those censors who viewed the American version of the picture "M", the words, "moral, educational, amusing and harmless" had an entirely different meaning than did the same words to the censors who approved the German production. If a picture which, if submitted for censorship on Monday, would be approved but, if substantially the same picture submitted on Tuesday, would be rejected because submitted to different censors, how can it be said that the criteria set forth in the Ohio statutes have any definitive meaning or precision whatever? In view of the facts before them, it is difficult

to comprehend how the Supreme Court of Ohio, who declined to view this picture, could conclude that "* * * the tests are sufficiently definite. No film which has a right to public exhibition can be excluded or rejected." (R., 66). 159 O. S. 315, 330. We believe that the court below defaulted in its obligation with respect to the "standards of certainty" required by the **Winters** case.

B. The Unlimited Power to Revoke Renders the Statute Void.

The scope of the censor's power in Ohio is not exhausted by looking at the initial tests. Section 154-47b further provides that a certificate of approval, even if once granted, may be revoked "* * * whenever in the judgment of the department of education the public welfare requires it." There is no requirement of notice, or hearing or return of fees paid; only the State's judgment that the public welfare requires such revocation. In **Gelling v. Texas**, the Supreme Court had before it language of identical purport. There the license to exhibit a motion picture could be denied if the censors were "* * * of the opinion that such picture (was) of such character as to be prejudicial to the best interests of the people. * * *" The untrammelled, uncharted, uncontrolled discretion granted by this provision was found unconstitutional.[14]

[14] See Justice Frankfurter's concurring opinion in Gelling v. Texas, 343 U.S. 960, 96 L. Ed. 1359; and see State v. Smith, 48 O. O. 310, 68 O. L. A. 452. In Jones v. Opelika, 319 U.S. 103, 87 L. Ed. 1290, wherein the court adopted the dissent in the same case (316 U.S. 584, 86 L. Ed. 1691) and vacated the earlier judgment, Chief Justice Stone said:

"The ordinance in the Opelika case should be held invalid on two independent grounds * * * The other is that the requirement of a license for dissemination of ideas, when as here the license is revocable at will without cause and in the unrestrained discretion of administrative officers, is likewise an unconstitutional restraint on those freedoms." 316 U.S. 584, 600.

C. The Law Permits Irresponsible and Arbitrary Interpretation and Enforcement.

This law is more than merely a "boundless sea." It is a weapon. Today, motion pictures deal with political and social issues of the broadest significance. They are a means of reaching and appealing to the public for attention to problems of the most difficult and often controversial aspect. It would be impossible to list all of the recent films dealing with issues of public importance in the fields of racial discrimination, the problems of the war orphan, readjustment problems of war veterans, Communist subversion, the problems of the criminally insane and the mentally ill, to mention but a few. As noted above, Ohio's law requires that all such films, as well as those which purport to provide nothing more than diversion, affirmatively measure up to the State's prescription of a proper purpose.

If the censor, as agent of the State, deems the appeal made by the film as doctrine inconsistent with his personal views, the label of "harmful" is enough to forever bar it from reaching the public. Thus, men suffering from all or any of the frailties of human judgment may cast them as a great cloud over the exercise of judgment of all of the public of Ohio. Such frailties as racial prejudice, religious bigotry, political or social intolerance, literary, musical or artistic illiteracy, or simply a lack of wit, unfortunate when viewed in an individual, are a calamity of incalculable proportions if imposed upon the culture of a whole state.[18]

[18] See, for example, Thornhill v. Alabama, 310 U.S. 88, 84 L. Ed. 1093; Hague v. C.I.O., 307 U.S. 496, 83 L. Ed. 1423; Thomas v. Collins, 323 U.S. 516, 89 L. Ed. 430; Cantwell v. Connecticut, 310 U.S. 296, 84 L. Ed. 1213; Gelling v. Texas, 343 U.S. 960, 96 L. Ed. 1359; and Motion Pictures and the First Amendment, Note, 60 Yale L. J. 696 (1951) and sources cited therein. Cf. United Artists v. Board of Censors, 189 Tenn. 397, 225 S. W. 2d 550; cert. den., 339 U.S. 952.

Aside from the risk of cynical or irresponsible or ignorant enforcement made possible by this law, the most fearful evil of all lies in the fact that the Ohio censor has the power to prohibit all but such motion pictures as hew to the line of doctrines prescribed by the State. Recent history has dramatized so painfully that the **sine qua non** of totalitarian government is the perfection of effective control of all of the vehicles of public information. It need not be the state control of a Nazi Germany or the party-line of a Communist Russia. State control of the dissemination of ideas, so abhorent to us all, may appear, cloaked in a pious purpose, even in Ohio. **Martin v. Village of Struthers,** 319 U.S. 141, 87 L. Ed. 1313. And see **Marsh v. Alabama,** 326 U.S. 501, 90 L. Ed. 265.

It is no answer to say that the system under review here is different because lines can be drawn and definitions reworked so that nothing really essential can be lost. We have shown that no valid line can be drawn; and that no mere man can sufficiently confine these standards. Indeed it begs the question to assume that some expression is essential and some is not as did the court below when it said: "No film which has a right to public exhibition can be excluded or rejected." The court thereby assumed the issue in the case, i. e., whether the State, in advance, can prescribe what has a "right" to be discussed. It is this kind of disregard of fundamental principle which disserves our basic institutions. We are all too familiar with the subtle encroachment upon immunity from state control, gradually resulting in an ever narrowing area until a body of precedent is built which permits a relatively small gesture to finally sweep all within the ambit of state control.

The court will observe that the Ohio statutes provide for no administrative procedure other than the payment of the fee, the submission of the film, and its approval or

rejection by the censor. No qualifications are required of any censor and no hearing is provided for when doubt is raised concerning a film. Instead, with no chart to guide him other than the statutory criteria the censor undertakes his duties armed with absolute and final power. The censor should not be condemned if he is ill prepared to perform his duties, or if his judgment is warped by reason of racial, religious, political or social prejudices. He performs his duty as best he can within the limits of his ability and the nebulous guide furnished him by the statute. The result, however, reflects the judgment of but one or, as in this case, three individuals, and their decision fixes the thought pattern for every movie goer in Ohio. The very antithesis of the words above quoted from **Matter of Application of Broadway Angels, Inc.**, supra, is the approach which **can** be and **has** been taken by a former Ohio censor. Illustrating the serious danger to the expression of thought which inheres in any form of censorship is the following statement of Mrs. Evelyn Snow:

> "We intend to cut out anything that reflects on the censors. The people are not the best judges of what is good for them. If they had been, censorship never would have been necessary. The people are not fit to judge for themselves. Statistics prove that only 10% of the people are thinking persons; 15% think part of the time and 75% never think at all. The fact that certain very objectionable and disgusting pictures barred from Ohio are permitted to show in the States which do not have censorship, proves the people are not the best judges." **New York Times**, 4/2/22, VI, 2:2.

Is it not entirely within the realm of possibility that a censor appointed to serve under the Ohio statute may fall within Mrs. Snow's classification of the "75% (who) never think at all"? How much more wise are the words of

Justice Roberts, who, speaking for a unanimous court in the **Cantwell** case, 310 U.S. 296, 310, 84 L. Ed. 1213, said:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

POINT III.

THE OHIO CENSORSHIP LAW AND THE ORDER MADE PURSUANT THERETO COMPRISE A DISCRIMINATORY DENIAL OF EQUAL PROTECTION OF THE LAW.

It has long been clear that a corporation in the position of defendant is a person entitled to the equal protection required under the Fourteenth Amendment of the United States Constitution. **Grosjean v. American Press Co.**, 297 U.S. 233, 80 L. Ed. 660, et seq. This court has declared that equal protection of the laws means the protection of equal laws in the sense that it requires "* * * that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and * * * no different or higher punishment should be imposed upon one than such as is prescribed to all for like offense." **Barbier v. Connolly**, 113 U.S. 27, 31, 28 L. Ed. 923, 925; **Yick Wo v. Hopkins**, 118 U.S. 356, 369, 30 L. Ed. 220, 226.

The problem is one of classification. As was said in **Truax v. Corrigan**, 257 U.S. 312, 337-338, 66 L. Ed. 254, 265:

> "While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis * * * but

it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

What then is the "thing" in respect to which the classification involved here pertains in light of this law's purpose?

The purpose and effect of the statute obviously is not directed at the film as such nor the people who act or direct or produce the motion pictures. The words of the statute permit no such construction. When the censors are required to look at all films prior to their exhibition to determine if they are "moral, educational, or amusing and harmless", it is obvious that they are scrutinizing the views expressed by this means of communication. Thus the purpose of the law is to evaluate the content, the ideas and the portrayal thereof in picture and sound in order to determine whether there is contained therein some material prejudicing public morals. We know that the State of Ohio does not have any law with a similar purpose directed at books, magazines, newspapers, radio, television, pamphlets, or person to person speech from any rostrum. These also are modes of communicating ideas by picture and/or sound. The "thing", then, that is being classified is the vehicle or means by which thought is communicated. Ohio has separated out this one system and deemed it appropriate to censor in advance the ideas in or message of each film before licensing it as suitable for public exhibition. The difference is mechanical not real, illusory not substantive. How the views are expressed and the vehicle of communication, as such, can hardly be said to have any connection whatever to the avowed purpose, i.e., protection of public morals. As pointed out above, the potential for evil of motion pictures is certainly not greater than the potential of simultaneous release to millions of readers of national periodicals or of the great daily newspapers or the potential involved in national television or radio audiences. If it be urged that it is a legislative determination, the wisdom of which is to

be given great weight, we can only direct the court's attention to the fact that, in addition to being wholly unreasonable, elsewhere in the Ohio statutes motion pictures are classified in precisely the same manner as other modes of communication and, indeed, for the same purpose. See Ohio G. C. Sections 13035, 13040 (Appendix B).

Three examples of the actual operation of this absurd classification—to illustrate that the burden is not imagined but real and onerous and a genuine restraint—will suffice to bring to the court the clear outlines of the unconstitutional operation of this discrimination.

The first example we cite arises as a result of **New American Library of World Literature v. Allen**, 114 F. Supp. 823 (D. C., Ohio) decided August 5, 1953. Briefly, the facts of this case are as follows: The chief of police of Youngstown, acting under color of an ordinance which provided that it was a misdemeanor to sell books "of any obscene or immoral nature," handed a local book dealer a list of 108 books and 33 magazines and ordered that they be removed from his shelves. The distributor was advised that if he failed to comply he would be arrested. The distributor resisted this move. After certain negotiations broke down he was handed a second list, this one containing the titles of 335 publications which were to be banned. At this point a preliminary injunction was sought and granted. In the court's opinion, in connection with the final disposition of the cause, holding the actions of the chief of police unconstitutional,[16] the court said:

> "* * * The defendant Allen possessed no lawful power to suppress publications under threat of prosecution.

[16] The validity of the ordinance itself had also been brought in issue. Because the terms of the ordinance permitted only subsequent punishment the court held it valid. But in so doing the court found it necessary to confine the terms of the ordinance to the effect permitted in U. S. v. One Book Entitled "Ulysses" by James Joyce, 72 F. 2d 705, 707 (C. A., 2d).

"* * * As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality whether the books were obscene or immoral in violation of the ordinance. In the event prosecutions were undertaken, the burden would rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression." 114 F. Supp. 823, 832-834.

The clear and vital distinction between "proof beyond a reasonable doubt" applicable to books, magazines and other periodicals and the opinion of some official resulting in suppression of movies could not be more categorically emphasized. If books and magazines are to be so treated, then motion pictures must be provided with "equal protection".

A further illustration of the greater constraint imposed by a licensing statute similar to Ohio's censorship law is afforded by the cases involving "The Birth of a Baby." The picture was refused a license by the regents of the State of New York. The court, upholding the regents' denial of a license, noted that there was considerable difference of opinion with respect to the decency of the film, and concluded that the regents' action was, therefore, not arbitrary or unreasonable. **Matter of American Committee on Maternal Welfare v. Mangan**, 257 App. Div. 570, 573, aff'd 283 N. Y. 551. Thereafter **Life Magazine** published a series of still pictures taken from the film, and its editor was charged with publishing indecent matter in violation of the Penal Law. The criminal court, in acquitting the editor, held that the difference of opinion with respect to

the propriety of the pictures "demonstrates the necessity of avoiding arbitrary censorship by a court." **People v. Larsen**, 5 N. Y. S. 2d 55. The fact that there was reasonable opinion on both sides of the question thus sustained the administrative censorship by the licensors, but prevented prosecution under a penal statute punishing improper publication.

Probably the most extraordinary example of the utter failure to in any way take seriously this court's rule that motion pictures are an organ of public opinion and entitled to the protection accorded speech and the press, in light of the requirement of equal protection, is found in comparing the views stated in **American Cancer Society, Inc. v. Dayton**, 160 O. S. 114 (decided July 1, 1953, just 60 days after the instant case below) with the views expressed by the Supreme Court of Ohio herein. The American Cancer Society's local chapter applied for a permit to conduct its annual campaign for funds. The Dayton ordinance permitted an "advisory board" to refuse the permit, taking into consideration, among other things,

> "* * * whether or not it believes that the applicant is proposing to serve an object, purpose, or movement in a field not already covered, or, if so, not adequately covered, representing a public charity or a charitable, philanthropic, or educational organization or enterprise, or other educational purpose, and that same will be beneficial to the people of the city of Dayton, * * * that the cause for which the solicitation is to be made is in fact charitable, educational, civic, patriotic, religious, or philanthropic; * * * and that it is not incompatible with the public welfare. 160 O. S. 114, 120. * * *"

A permit was denied. An appeal to the city commission was provided for and in fact made. In the instance in question the advisory board decision was affirmed. Ohio's

Supreme Court, in affirming a decision by the Court of Appeals of Montgomery county that the above quoted section was unconstitutional, said:

> "* * * there can be no doubt that educational promotion and solicitation of funds for worthy charitable organizations by those interested in them come within the constitutional guaranties of freedom of speech, freedom of the press, and liberty of action."
>
> "The sections of the ordinances, involved in the present case, lay * * * down no standards as to what will be beneficial to the people of Dayton but leave that question to the whimsical judgment of the board and commission. * * *"
>
> "* * * a legislative body can not vest powers in a commission which restrict persons or organizations unless in the legislation there is set up some standards of action which relate to legitimate objects for the exercise of the police power and which operate equally upon all persons and organizations. A law which operates arbitrarily and with discrimination upon those engaged in the same enterprises can not be valid, nor can one which gives arbitrary powers to a commission which are in no way related to the public health, safety, or welfare.
>
> "Although the board and the commission doubtless acted in good faith, it is obvious from what we have said that sections 638-4 and 638-5 are invalid as not reasonably related to the public welfare and grant powers to a commission giving it a right to restrict privileges of organizations and persons, without standards, properly within the police power, to guide it, thus enabling it to exercise arbitrary powers in conflict with constitutional guaranties." 160 O. S. 114, 122, 125, 128.

In making these statements the court relied upon and quoted at length from **Cantwell v. Connecticut**, 310 U.S. 296, 84 L. Ed. 1213. The only surprising thing about this opinion is that it was said in practically the same breath as was the opinion below with relation to motion picture censorship, which approved banning of all but those which were,

in the opinion of the censors, moral, educational or amusing and harmless, to wit:

> "The criteria by which films shall be judged under the terms of the statute could doubtless have been made more definite, but * * * no film which has a right to public exhibition can be excluded or rejected. In our opinion, the statutory tests provided may be applied without great difficulty. * * * " 159 O. S. 315, 330.

The difference between banning a movie because it does not meet a censor's opinion as to what is moral, or what is educational or what is amusing and banning solicitations because the cause being supported does not meet an official's opinion as to what is "a public charity or a charitable, philanthropic or educational organization or enterprise or other educational purpose" utterly escapes us. The power to revoke a permit to show movies if "the public welfare requires it" seems indistinguishable from the power to deny an organization a permit to solicit if it is "incompatible with the public welfare." But, as to movies, the court below held the power to ban good; as to the American Cancer Society, the ban was unconstitutional as a violation of the speech and press guarantees.

It must be clear that motion pictures are not being accorded the protection of equal laws in Ohio. The State not only permits prior restraint and suppression, based upon pure opinion (such opinion being based upon apprehension or assumption or less) without proof of any kind; the State also applies an entirely different set of "standards" to determine whether or not the cause being espoused is entitled to constitutional protection.

Thus, if it is a motion picture in Ohio—(1) it is subject to scrutiny in advance; (2) the censor may reject the film if its purpose or presentation or any part thereof offends

his views of what is a moral purpose, or what is educational or what is amusing and harmless; (3) no proof of cause or effect need be entertained by the censor, (indeed, we know of no instance in the entire history of the administration of this act wherein evidence pertaining to the impact of a movie on anyone has ever been considered); and (4) if rejected and there is any reasonable doubt, the decision is affirmed by Ohio's court (if in fact the Ohio court deigns to look, an obligation it apparently regards as more visceral than legal). If on the other hand the views presented by motion pictures are espoused through the medium of the newspaper, the radio, by television (even by motion pictures originating locally or elsewhere), books, magazines, pamphlets or by house to house solicitation, there is only the responsibility imposed by law for abuse, Such abuse is subject (1) only to consideration after the publication; (2) to the judgment of a jury under rigid standards; (3) proof beyond a reasonable doubt; and (4) to review in which the court, if doubt remains, resolves it in favor of the accused.

This court has said that the State may not distinguish between men and men in terms of race, religion, color or national origin for the purpose of depriving them of equality before the law in such basic matters as employment opportunities, **Heim v. McCall**, 239 U.S. 175, 60 L. Ed. 206; **Crane v. New York**, 239 U.S. 195, 60 L. Ed. 218; ownership of property and right to contract therefor, **Buchanan v. Warley**, 245 U.S. 60, 62 L. Ed. 149; **Shelley v. Kraemer**, 334 U.S. 1, 92 L. Ed. 1161; **Hurd v. Hodge**, 334 U.S. 24, 92

L. Ed. 1187; **Barrows v. Jackson**, 346 U.S. 249, 97 L. Ed. 527; the right to vote, **Nixon v. Herndon**, 273 U.S. 536, 71 L. Ed. 759; **Lane v. Wilson**, 307 U.S. 268, 83 L. Ed. 1281; **U. S. v. Classic**, 313 U.S. 299, 85 L. Ed. 1368; and trial by a jury, **Cassell v. Texas**, 339 U.S. 282, 94 L. Ed. 839; **Patton v. Mississippi**, 332 U.S. 463, 92 L. Ed. 76.

If these matters must be dealt with in an even handed non-discriminatory manner we believe that it is at least as important that the State be barred from attempting to classify or distinguish between "organs of public opinion." Each medium of communication fulfills the same function. Each "stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." (**Grosjean v. American Press Co.**, 297 U.S. 233, 250, 80 L. Ed. 660, 669.) For the State to declare that one is good while another is not is for the State to assume a prohibited role. As was said in **Lovell v. Griffin**, 303 U.S. 444, 452, 82 L. Ed. 949, 954:

> "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Accordingly, when the State of Ohio burdens one section of the "press" in a manner different from another, even assuming the burden per se is valid (which we deny), the attempt is unconstitutional as a violation of the equal protection requirement.

POINT IV.

THE ORDER MADE PURSUANT TO THE OHIO CENSORSHIP LAW CONSTITUTES AN UNCONSTITUTIONAL ABUSE OF DISCRETION.

Without viewing the picture the Ohio court proceeded to appraise its content. Of course, the only evidence of its content it considered was the script, the censors' rejection slip, and the briefs of appellant and appellee. These the court concluded were sufficient to permit it to appraise the picture and concluded that since it was as bad as the censors and the attorney general said that it was, the state in the exercise of its police power should ban the picture. The risk foreseen by Justice Frankfurter in the **Burstyn** case is baldly presented here, for indeed, the administrative first step became the last. (343 U.S. 495, 532, 96 L. Ed. 1098, 1121-1122) Any statute which permits the licensor, as final arbiter, to impose his views and restrain the free expression of man's thought is one which is invalid on its face.

Despite the failure to view the picture, the Ohio court made the startling observation that "it is apparent that the lofty purposes of the picture, as expressed by its producers, would appeal only to a limited number of its viewers, * * *." (R., 65.) It is difficult to comprehend how the court could urge such assumption, even if true, as justification for the banning of this movie. If as the court says the movie would appeal to a "limited number of its viewers", the same objection could be made to "King Lear", "Faust", and any number of other plays which require an audience having a mentality greater than a twelve-year-old. Must we conclude that the purpose of the Ohio act is to reduce the intellectual tone of movies to the level of a

child and that that purpose lends validity to the statute? If this be the case, then all movies which deal with contemporary social, economic or political problems either will be banned or deleted by the Ohio censor. This philosophy of the court finds support in the statement of Mrs. Evelyn Snow quoted at page 34 above.

It is difficult to comprehend how anyone who has seen the motion picture "M" can conscientiously say that this picture does not represent the best efforts of an acknowledged artist in the field of motion picture production. It is a dramatic, moving, exciting drama, tense with action, replete with scenes of unsurpassed artistry, yet free from lurid, sensational, vulgar or suggestive episodes.

No one who views this picture can fairly say that the total impact of this movie is anything but good. (See also the script—Exhibit B.) (R., 24.) There is **nothing** about the picture which can be characterized as immoral. (This is manifestly so when "immoral" is defined as in **Commercial Pictures v. Board of Regents**, 305 N. Y. 336.) On the contrary, the purport of the whole plot is to so impress its viewers with the consequences of neglect and apathy that affirmatively moral and righteous attitudes toward the problems dramatized will result. Obviously it is "educational" for it reveals to its audience the sources of five significant contemporary social problems, and then, either proposes a solution or appeals for public understanding and action. (See Exhibit C.) (R., 47.) And in the sense that it is a compelling dramatization of a story, told through the artful use of a camera, characterization, mood and music it is "amusing". Every episode in the picture is enacted in real life almost daily. It portrays nothing but the truth. Yet "M" was rejected "on account of being harmful."

Is it harmful to present to the parents of Ohio children a warning that the risk of abduction and mistreatment is always present when small children are permitted to wander unattended upon the public streets?

Is it harmful to tell the public that many police forces are handicapped by lack of adequate personnel and are limited by lawfully prescribed methods and procedures when faced with the solution of a crime which does not fall within the scope of the conventional criminal mind?

Is it harmful to make the public aware of the necessity of providing modern, well-staffed, and otherwise adequate institutions for the treatment, care and confinement of the mentally ill patient who is subject to periodic maniacal tendencies?

Is it harmful to emphasize again that one of the most fertile fields for the production of mental instability is the broken home with the consequent feeling of insecurity which develops in the child of such home?

Is it harmful to expose the fact that the criminal syndicate of any city thrives only because of the multitude of petty criminals, toward whom the public often is apathetic and frequently even tolerant?

Surely no harm can flow from the portrayal of such sociological, political and medical problems, as presented by "M". A review of the reasons given by the censors (R., 19), in the light of the viewing by this court, can lead to but one conclusion—the "discretion" purportedly vested in them has been grossly abused and the "judgment" that the statute assumes to require them to exercise has utterly failed.

In view of the censors' comments, can anyone fairly say that there was any attempt to evaluate this motion picture as an integrated document? Cf. Stipulation number (7)

and Exhibit C. (R., 13.) One is compelled to the conclusion that, instead of judgment and discretion, there was only vacuous myopia. Here indeed are the "pernicious and stultifying" suppression and the "cloud" cast over the "judgment of all of the public of Ohio."

Whenever it has become apparent that an administrative agency has so arbitrarily and unreasonably exercised the power delegated to it as to deprive a person of his constitutional right of free speech, this court has not hesitated to declare the exercise of the power unconstitutional. **Stromberg v. California**, 283 U.S. 359, 75 L. Ed. 1117; **Herndon v. Lowry**, 301 U.S. 242, 81 L. Ed. 1066; **Schneider v. State**, 308 U.S. 147, 84 L. Ed. 155; **Cantwell v. Connecticut**, 310 U.S. 147, 84 L. Ed. 1213. Certainly, reliance by the censors upon nothing but assumption is an unconstitutional abuse of discretion in light of the considerations reviewed above. (Point I, C.)

POINT V.

THE OHIO CENSORSHIP LAW IMPOSES A TAX UPON THE RIGHT OF FREE SPEECH AND PRESS.

The schedule and disposition of the fees charged by the Division of Censorship are set forth in detail in the statute. The fee is calculated at the rate of $3.00 per 1000 linear feet of film, or fraction thereof, and all money so received then must be paid into the state treasury to the general revenue fund, except as otherwise provided in Section 154-47a. (Section 154-47.) The income of the division and the distribution thereof is set out in tabular form in stipulation number (6). (R., 10, 11, 12, 13.)

The fees charged are plainly an excise tax, pure and simple. As noted by Judge Wiley in **State v. Smith**:

> "The name by which the exaction is referred to does not necessarily determine whether it is a mere inspection fee or a tax. Baker v. Cincinnati, 11 O.S. 534 (1860). So, while the charge is referred to in Section 154-47 as a fee, and in 154-47a as 'motion picture license fees', these are definitely stated to be in excess of the necessary payments for censoring, Section 154-47a. This excess is, therefore, not a charge for inspecting for licensing but is an excise tax, even though not so designated in the statutes. Prudential Coop. Realty Co. v. City of Youngstown, 118 O.S. 204, 214 (1928); Mays v. Cincinnati, 1 O.S. 268 (1852); State v. Hipp, 38 O.S. 199 (1882); Saviers v. Smith, 101 O.S. 132 (1920).
>
> "It is, therefore, apparent from the statute itself and the decided cases that this is not merely a license fee to cover the cost of making the inspection, but is a tax imposed on motion pictures." 48 O. O. 310, 314-315, 63 O. L. A. 452.

In disposing of this contention the Ohio Supreme Court, in the fourth branch of the syllabus which constitutes the law of Ohio, says:

> "4. The fees required by statute for the inspection and censorship of moving picture films to be publicly exhibited within the state, even though such fees exceed to some extent the necessary cost for making the inspection, constitute license fees and not a tax and are, therefore, not discriminatory or unlawful." 159 O. S. 315, 112 N. E. 2d 311.

It is difficult to know just what the court meant by the expression "such fees exceed to some extent the necessary cost for making the inspection." This bland statement disregards the fact that, in every year of the past ten, the funds collected by the division of film censorship as "fees" from the motion picture industry and expended by the state of Ohio for purposes other than the administration of the licensing system have exceeded by 500% to 1400% the operating costs of the division. During this ten-year period the operating costs of the division totaled $334,364.56 while the funds collected and expended either through the general fund or for the support of visual education aggregated $2,229,964.59. Under O. G. C. Section 154-47a, now R. C. Section 3305.03, all unexpended funds collected from the motion picture industry under the guise of a fee, other than the relatively small amount expended in payment of the operating costs of the Division of Censorship, are now paid over to the office of the director of visual education of the Department of Education. These funds are its only source of income. There appears to be no good reason why the motion picture industry should be its sole support. It is thus apparent that this act constitutes a revenue measure producing substantial income to the state of Ohio. It is clearly a tax imposed upon motion pictures and it is none-

theless so because it is called a "fee." This is buttressed further by the fact that there is not just one "fee" per picture. This so-called fee is charged against every print of each picture exhibited in Ohio.

A tax such as that imposed by the statute upon the right to express one's views through the medium of the motion picture is a form of prior restraint and violates the guaranties of the right of freedom of speech and of the press. This form of restraint has been condemned by this court in **Grosjean v. American Press Co.**, 297 U.S. 233, 80 L. Ed. 660, where at page 250, 668-669, the rule is announced:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile missuse against the freedom of the press.
>
> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

No other media of expression in the state of Ohio is similarly taxed, and it therefore becomes apparent that the so-called license fee is but a tax on films measured by their length.

In **Murdock v. Pennsylvania**, 319 U.S. 105, 113, 87 L. Ed. 1292, 1298, the rule was clearly stated by this court as follows:

> "A state may not impose a charge for the enjoyment of a right granted by the federal constitution. . . . The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this court has repeatedly struck down."

If the imposition of a license fee as a condition precedent to the right of a person to sell religious literature is unconstitutional, there can be no doubt that a statute which imposes a license tax upon the right to express religious, social, economic, and political thoughts through the medium of the motion picture should likewise be unconstitutional.

CONCLUSION.

If it were the intention of a legislature to write a law which violated or permitted violation of every constitutional safeguard to freedom of expression adhered to by this court, the terms of such a hypothetical law could very well be identical to those found in Ohio G. C. Sections 154-47—154-47i, inclusive (R. C. 3305.01-3305.99). In order to sustain this statute, the majority of the Supreme Court had to ignore all of these safeguards. In so doing, it erred in every respect set forth in the specification of errors. Accordingly the judgment of the Supreme Court of Ohio should be reversed and the statute in question declared null and void.

Respectfully submitted,

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APPENDIX A.

The system of censorship for motion pictures in Ohio is provided in the following sections of the General Code.

Sec. 154-47. (R. C. Sec. 3305.01) (Department of education to examine and censor films; exception; fees; penalty for violation.)

It shall be the duty of the department of education to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio, except motion picture trailers, all of the scenes of which are included in a previously censored film. Such films shall be submitted to the department and passed and approved by it before they shall be delivered to the exhibitor for exhibition. The department shall charge a fee of three dollars for each reel of film to be censored which does not exceed one thousand linear feet and three dollars for each additional one thousand linear feet or fractional part thereof. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund, except as otherwise provided in section 154-47a of the General Code. Any person, firm or corporation who shall publicly exhibit motion picture trailers exhibiting scenes ordered deleted by the department of education or exhibiting scenes which were not included as a part of the motion picture which it advertises, at the time it was censored, shall be subject to the penalty provisions of section 154-47e of the General Code.

Sec. 154-47a. (R. C. Sec. 3305.03) (Appropriation for educational purposes; expenditure of funds.)

Fifty per cent of all moneys received from the motion picture license fees collected under the provisions of section 154-47 of the General Code, in excess of such amount

as shall be necessary to pay the operating expenses, including salaries, of the division of film censorship shall be paid into a fund to be used by the superintendent of public instruction for disseminating information relative to the history, scenic beauties, natural resources, and industries of Ohio through the office of the director of visual education of the division of public instruction, department of education, and for the creation, maintenance, administration and regulation of a suitable collection of visual aids for loan to the educational institutions of Ohio. The total sum so set aside annually from the fees collected under section 154-47 of the General Code are hereby and hereafter appropriated to the controlling board for the use of the department of education. Such funds shall be expended only upon the authority of vouchers approved by the superintnedent of public instruction and no expenditure from such funds may be made except for the purposes enumerated in this section.

Sec. 154-47b. (R. C. Sec. 3305.04) (What films shall be passed and approved; official stamp; recall of film.)

Only such films as are in the judgment and discretion of the department of education of a moral, educational or amusing and harmless character shall be passed and approved by such department. When a film has been censored by the department of education a certificate showing the approval or rejection of such film shall be issued to the party submitting the film. When a film is passed and approved by the department of education such film shall be given an approval number which shall be shown on the certificate issued by the department of education to the party submitting the film. Such certificate shall also show the title of such film and all eliminations ordered from such film by the department of education. For each film

so approved there shall also be issued by the department of education an official leader or stamp of approval of not less than five feet in length bearing the words "Approved by the Ohio department of education" and the number assigned to such film on the certificate of approval. Such official leader or stamp of approval shall also contain an outlined map of the state of Ohio with the great seal of the state of Ohio printed thereon. The department of education shall be authorized to recall any film for recensoring or to revoke any certificate permitting the exhibition of any film in the state of Ohio, whenever in the judgment of the department of education the public welfare requires it. Before any motion picture film shall be publicly exhibited all eliminations ordered by the department of education shall have been made by the person or persons loaning, renting or leasing such film or films to the exhibitor for exhibition, and there shall be projected upon the screen the design of the official leader or stamp of approval of not less than three feet in length, issued by the department of education for such film.

Sec. 154-47c. (R. C. Sec. 3305.05) (Department may work in conjunction with censor boards of other states.)

The department of education may work in conjunction with any censor board or boards of legal status of other states as a censor congress and the action of such congress in approving or rejecting films shall be considered as the action of the department of education and all films passed, approved, stamped and numbered by such congress, when the fees therefor have been paid to the Ohio department of education, shall be considered approved by the Ohio department of education.

Sec. 154-47d. (R. C. Sec. 3305.08) (Approval by department of education or the censor congress.)

No films may be publicly shown or exhibited within the state of Ohio unless they have been passed and approved by the department of education or the censor congress and stamped and numbered by the department of education, or censor congress, as provided herein.

Sec. 154-47e. (R. C. Sec. 3305.08) (Unlawful acts; penalties.)

Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed and approved by the department of education shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, for the first offense, and shall be fined not less than three hundred dollars nor more than five hundred dollars for each separate subsequent offense. Any person, firm or corporation acting as a distributor of motion picture films who shall deliver any film or films to any exhibitor or other person for public exhibition within the state of Ohio before such film or films shall have been passed and approved by the department of education, shall upon conviction thereof, be fined not less than three hundred dollars nor more than five hundred dollars, for the first offense, and shall be fined not less than five hundred dollars nor more than one thousand dollars for each separate subsequent offense. Any person, firm or corporation acting as a distributor of motion picture films who shall deliver any film or films to any exhibitor or other person for public exhibition in the state of Ohio before eliminations, ordered by the department of education have been made, shall upon conviction thereof, be fined not less than three hundred dollars nor more than five hundred dollars, for the first

offense, and not less than five hundred dollars nor more than one thousand dollars for each separate subsequent offense. Any person, firm or corporation who shall publicly exhibit or show any motion picture or film within the state of Ohio without having first projected upon the screen the design of the official leader or stamp of approval of not less than three feet in length, assigned to such film as shown on the certificate issued by the department of education, shall upon conviction thereof be fined not less than twenty-five dollars nor more than three hundred dollars, for each offense. Any person, firm or corporation acting as a distributor of motion picture films who shall deliver to an exhibitor or other person for public exhibition within the state of Ohio, any motion picture film to which is not attached or which is not accompanied by the leader of approval of not less than three feet in length, assigned to such film as shown on the certificate issued by the department of education, shall upon conviction thereof, be fined not less than twenty-five dollars, nor more than three hundred dollars, for each offense. Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio that contains parts or sections that have been ordered eliminated by the department of education, or that contains any part or parts which have been added to the motion picture after the same has been censored and approved by the department of education, shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars, for the first offense, and shall be fined not less than three hundred dollars nor more than five hundred dollars for each separate, subsequent offense. Any person, firm or corporation acting as a distributor of motion picture films who shall deliver any film or films to any exhibitor or

other person for public exhibition within the state of Ohio, which film or films contain parts or sections that have been ordered eliminated by the department of education or which contain any part or parts that have been added after the original film or films have been censored and approved by the department of education, shall upon conviction thereof, be fined not less than three hundred dollars nor more than five hundred dollars for the first offense, and shall be fined not less than five hundred dollars nor more than one thousand dollars for each separate subsequent offense. Any person, firm or corporation who shall publicly exhibit or show within the state of Ohio any motion picture when the certificate permitting the exhibition thereof has been revoked under the provisions of section 154-47b of the General Code, shall upon conviction thereof, be fined not less than twenty-five dollars nor more than three hundred dollars for the first offense, and shall be fined not less than three hundred dollars nor more than five hundred dollars for each separate subsequent offense. Any person, firm or corporation acting as a distributor of motion picture films who shall deliver to any exhibitor or other person for public exhibition within the state of Ohio any motion picture when the certificate permitting the exhibition thereof has been revoked under the provisions of section 154-47b of the General Code, shall upon conviction thereof, be fined not less than three hundred dollars nor more than five hundred dollars for the first offense, and shall be fined not less than five hundred dollars nor more than one thousand dollars for each separate subsequent offense.

Sec. 154-47f. (R. C. Sec. 3305.08) (Counterfeiting official leader, or stamp of approval, prohibited; penalty.)

Any person or agent, employee or officer of a corporation or firm who shall counterfeit such hereinbefore described official leader or stamp of approval or use or have in his possession such a counterfeit leader or any similar designation not issued by the department of education, shall upon conviction thereof, be fined not less than one hundred dollars nor more than three hundred dollars, or be imprisoned not less than thirty days nor more than one year, or both, for each offense.

Sec. 154-47g. (R. C. Sec. 3305.06) (Courts having jurisdiction.)

A justice of the peace, mayor or police judge shall have final jurisdiction within his county in a prosecution for a violation of any provision of the laws of Ohio relating to the regulation and censoring of motion picture films.

Sec. 154-47h. (R. C. Sec. 3305.07) (Commencement of action in supreme court to review order of department.)

Any person in interest being dissatisfied with any order of the department of education relative to the censoring of motion picture films may commence an action in the supreme court of Ohio, against the department of education as defendant to set aside, vacate or amend any such order on the ground that the order is unreasonable or unlawful and the supreme court is hereby authorized and vested with exclusive jurisdiction to hear and determine such action. The department of education shall be served with summons as in other civil cases. The answer of the department of education shall be filed within ten days after service of summons upon it and with its answer it shall file a certified transcript of its record in said matter. Upon the filing of said answer said action shall be at issue

and shall be advanced and assigned for trial by the court, upon the application of either party, at the earliest possible date.

Sec. 154-47i. (R. C. Sec. 3305.02) (Advisory board of film censorship; appointment, term, and compensation.)

An advisory board of three members is hereby created in the department of education, to be known as the advisory board of film censorship. The members of this board shall be appointed by the governor, to serve during his pleasure, and shall receive no compensation, but shall be entitled to their actual and necessary expenses incurred in the performance of their official duties. Such board shall assist and advise the department of education in the examination and censorship of motion picture films.

(The penalties provided above are collected in R. C. Sec. 3305.99.)

APPENDIX B

Section 13035. (R. C. Sec. 2905.34) (Penalty for selling, exhibiting, possessing, etc., obscene literature, or drugs, for criminal purposes.)

Whoever knowingly sells, lends, gives away, exhibits or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession or has under his control an obscene, lewd or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture photograph, motion picture film or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or

article of an indecent or immoral nature or a drug, medicine, article or thing intended for the prevention of conception or for causing an abortion, or advertises any of them for sale, or writes, prints, or causes to be written or printed a card, book, pamphlet, advertisement or notice giving information when, where, how, of whom or by what means any of such articles or things can be purchased or obtained, or manufactures, draws, prints or makes such articles or things, or sells, gives away or shows to a minor, a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibits upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures, shall be fined not less than two hundred dollars nor more than two thousand dollars or imprisoned not more than seven years, or both.

Section 13040. (R. C. Sec. 2905.40) (Giving immoral exhibition.)

Whoever gives a public or private exhibition of a lascivious, indecent, immoral or impure nature or an exhibition tending to corrupt morals, or owns or operates or permits another to operate on his premises, a phonograph or other device giving forth profane, indecent, immoral or impure language, or owns or operates or permits another to operate on his premises, a picture machine or other device exhibiting a lascivious, indecent, immoral or impure picture or figure or a picture of crime or lust, or a picture tending to corrupt morals, shall be fined not less than fifty dollars nor more than five hundred dollars, and for each subsequent offense, in addition to such fine, shall be imprisoned not less than thirty days nor more than six months.